Ombudsman
SASKATCHEWAN

Provincial Ombudsman

SUMMARY OF CONCLUSIONS

IMPOSITION OF BAN ON SMOKING AT SASKATCHEWAN CORRECTIONAL FACILITIES

A. PREFACE

In 1999, the Corrections Division of Saskatchewan Justice decided to implement a ban on smoking in all provincial correctional centres effective, depending on the centre, various dates commencing March 2000 and for some, as late as September 2000. The decision drew significant public and media attention commencing in about February 2000. In addition, several people - not all of them inmates - called my office complaining that the smoking ban was unfair. I commenced an investigation of my own motion.

B. BACKGROUND

Until January 1, 1995, smoking by inmates and staff at Saskatchewan correctional facilities was generally unrestricted. In 1994, Corrections Division announced its intention to ban smoking on all correctional centre property (indoors and out) effective January 1, 1995. In response to public, inmate and staff reaction and, perhaps in part, in response to a Judge's comments on the issue, Corrections Division announced a compromise allowing smoking outdoors effective November 20, 1995.

Immediately at some centres and almost immediately at others, however, it was decided that smoking would be allowed indoors in designated, ventilated areas. Thus, the "blue rooms" were created. These continued in use until the imposition of the year 2000 ban. An absolute prohibition against smoking inside correctional facilities was never - or only very briefly - in place and/or enforced prior to March 2000.

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C. THE INVESTIGATION

1. The Decision

The decision to ban smoking in correctional centres in 2000 was driven by the Division's desire to provide a safe and healthy workplace to its employees. Corrections Division had attempted the compromise of restricted smoking since 1995 but found it was not satisfactory in achieving its objective. In addition, certain rulings by the Occupational Health and Safety Branch (OH&S) reinforced the Division's belief that some limitation on smoking was necessary. Corrections concluded that a total ban was the best means to address what it views as pressing health issues and corresponding obligations to its staff.

2. Implementation

Detailed implementation plans were developed for all affected correctional centres. Differences among the institutions were accommodated; it was clearly accepted that there could not be a "one size fits all" plan. Differences in physical structure and programming led, for example, to the decision to impose the ban across all units of the Regina facility at one time, while the ban was to be phased in over several months at the Saskatoon facility. The Prince Albert men's and women's facilities intend to implement the ban in the fall of this year.

While virtually ignoring the effects of withdrawal at the time of the 1995 ban, in 2000 Corrections gave serious consideration to these effects. They were accommodated by advance inmate notification, provision of stop-smoking programs in advance of implementation, availability of stop-smoking aids such as nicotine patches and nicotine gum, increased allowable limit for canteen purchases, routine availability of extra snacks such as vegetable sticks and popcorn, back-up security planning, increased after-hours activities and consideration of aboriginal spiritual needs. Indeed, Corrections deserves to be commended for the extensive steps it took to accommodate inmate needs associated with withdrawal.

3. Other Jurisdictions

The experience in other Canadian jurisdictions is, I think, useful. Ontario, which has the largest number of provincial correctional facilities, is operating under all variations - institutions with total bans, smoking reductions and restricted smoking areas. British Columbia is considering and apparently is likely to implement a total ban in all institutions shortly. Nova Scotia allows smoking in designated areas. Newfoundland permits inmate smoking in cells and common rooms but requires staff to limit their smoking to outdoors.

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Federal institutions considered a total ban but abandoned the idea before the scheduled implementation date. Instead, federal institutions allow smoking in cells and designated areas, as well as outdoors. The Saskatchewan penitentiary has a smoke-free unit, which currently has a waiting list.

We did not locate a Canadian facility which prohibits inmate smoking indoors but allows it outdoors.

4. Considerations Supporting a Total Ban

The Department of Justice summarized the reasons for proceeding with a total smoking ban in a directive related to its smoking policy. These were:

- The health hazards of tobacco smoking are well documented.
- Allowing smoking in the workplace conflicts with the employer's responsibility to provide for a healthy work environment.
- Involuntary exposure to tobacco smoke in the workplace is a hazard over which the employer and the employees have control.
- Banning smoking in correctional facilities is sound public policy, given the increasing cost of medical care and the link between smoking and health problems.
- A total ban is the most appropriate way to address the problem of inmate and staff exposure to second-hand smoke, given the logistical problems of keeping smokers and non-smokers separate.
- A non-smoking policy diminishes possible fire risks and fosters a sanitary employment atmosphere.

5. Considerations Against a Total Ban

We have compiled the following list of considerations against a total ban on smoking:

- Smoking is a legal activity, save where restricted by law (usually municipal).
- A correctional facility is an inmates' home, from which the inmate does not have the privilege of coming and going.
- There is a real risk that the enforced restriction against smoking might increase tension and thereby increase safety risks to staff and inmates.

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- Addiction withdrawal has been cited as the impetus for mood swings and property damage at other institutions which imposed a total ban.
- Tobacco is an integral part of aboriginal culture and a total ban might be viewed as discrimination on the basis of religion.
- A healthy workplace can be secured through less intrusive measures, such as designated areas.

D. ANALYSIS

Our analysis was founded on certain premises as follows:

- The imposition of a complete ban on smoking in correctional facilities is lawful, not contrary to the Charter of Rights and Freedoms and is within the authority of the Department of Justice.

- The imposition of a partial ban on smoking in correctional facilities or restrictions on smoking in correctional facilities are equally lawful, not contrary to the Charter of Rights an Freedoms and is also within the authority of the Department of Justice.

- Allowing unrestricted smoking in correctional facilities is probably not lawful and, in any event, is not a reasonable option.

- Smoking is a lawful activity, subject to legislated (usually municipal) restrictions.

- Nicotine is a highly addictive substance and withdrawal can be very difficult.

- Smoking is hazardous to an individual's health.

- Exposure to second-hand smoke is hazardous to an individual's health, if the concentration exceeds certain levels.

- Prisons are unusual workplaces in that they are both a workplace and, for the inmates, a residence from which the occupants do not have freedom of movement.

- The majority of inmates and a large proportion of staff at correctional centres are smokers.

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- Corrections' staff can and should be expected to competently undertake their assigned duties.

Our consideration of the case, as noted in the premises above, assumed that the imposition of a total ban was lawful; our review was limited to the question of whether or not the ban was fair. In these deliberations, we considered the following questions as instructive:

1. **Is the objective of the prohibition of sufficient importance to override the inmate's privilege of smoking?**

   Information gathered in our investigation clearly indicates that Corrections' objective was to eliminate the health hazards posed by second-hand smoke. This is an objective that is clearly viewed as important in all workplaces and one that is - I think unarguably - sufficiently important to override the inmate privilege of smoking.

2. **Are means chosen to achieve that objective demonstrably reasonable?**

   It is obvious that the elimination of second-hand smoke will also eliminate the associated health hazards and it is equally obvious that a total ban will achieve the goal of minimizing exposure to second-hand smoke.

   However, we did not find any evidence that exposure to any and every level of second-hand smoke presented a health hazard. Tests conducted by Occupational Health and Safety Branch in Unit 1A at the Regina Centre (a non-smoking unit located adjacent to a blue room) found that the fresh air exchange was well within acceptable limits. From this, OH&S concluded that the level of second-hand smoke did not breach the legislation and would not be considered a health hazard.

   Thus, it may be that some smoking could be allowed indoors without exceeding allowable limits and, consequently, that the imposition of a total ban on indoor smoking may restrict inmate smoking to a greater degree than is necessary to reasonably achieve the Division's objective of eliminating the health hazards posed by second-hand smoke.

   At this time, however, there has been insufficient scientific testing for us to draw conclusions on this question.

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3. Is the total ban rationally connected to the objective of providing a healthy workplace?

The answer to this question is clear and obvious. A total ban on smoking is clearly rationally connected to the object of eliminating the health hazards associated with second-hand smoke.

4. Is the privilege of smoking impaired as little as is reasonable?

We have concluded that some exposure to second-hand smoke may be reasonably allowed in order to achieve the best balance between the competing interests at issue. However, the fact that an alternative exists does not necessary render the prohibition unfair.

Irrespective of the answer to that question, there has been no suggestion that smoking outside exposes staff or inmates to unacceptable levels of second-hand smoke. In imposing a restriction against smoking outside, Corrections may have compromised the inmates' smoking privilege to a degree greater than necessary.

5. Is the adverse effect proportional to the importance of the objective?

The adverse effects of the total ban on inmate smokers include the elimination of a pleasurable pastime, withdrawal symptoms, increased tension in the institution, consequent increased risk to staff and inmates and, for aboriginal inmates, more limited access to tobacco for spiritual use. A determination of the proportionality of the adverse effects to the importance of the objective would necessarily involve a quantification of both the adverse and beneficial effects of the ban. We are not aware that Corrections attempted this exercise but suspect that the two would be proportional.

E. CONCLUSION

Based on the above analysis, I am not convinced that Corrections' decision to ban smoking inside provincial correctional facilities is unreasonable. The objective which led to the ban is clearly unobjectionable and the imposition of a total ban on indoor smoking, while only one of many alternatives, is the surest means to most effectively secure the objective.

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The fact that other institutions in Canada and elsewhere have reached a similar conclusion, while not definitive on any issue, lends support to the reasonableness of Corrections' decision.

F. OTHER CONSIDERATIONS

Having concluded that the decision to impose a total ban on indoor smoking was reasonable, I would note, nonetheless, that it is clearly possible to achieve the stated objective through less extensive measures. Corrections itself is dedicated to the proposition that in its dealings with inmates, it will resort first to the least restrictive measure; it seems to me that the proposition would lead, in this case, to a more sensitive and equally effective result.

Alternatives are available, perhaps including limited designated smoking areas within institutions or, at least, allowing smoking outside. Both of these alternatives were rejected primarily because of perceived difficulties in enforcement.

In the result, one of the inmates' few privileges and comforts has been wholly eliminated. While I accept that enforcement of a ban on inside smoking would be more difficult to enforce than a ban inside and out, I would be far more comfortable in supporting Corrections' decision if it would first make a sincere effort at imposing and enforcing a ban only on inside smoking.

Provincial Ombudsman
Province of Saskatchewan
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